



# MITIGATING SPIRALS OF CONFLICT IN DoD SOURCE SELECTIONS

 ***Steven M. Maser and Fred Thompson***

Government contracting is rife with opportunities for miscommunication and misperception. This can undermine trust and fuel spirals of conflict. For this article, the authors interviewed participants and analyzed Government Accountability Office (GAO) bid protest decisions involving Department of Defense source selections. They found agency, vendor, and GAO practices that trigger and fuel these spirals. Contracting agencies and GAO can take steps to improve communication, reduce inconsistencies, and reduce perceptions of bias, thereby mitigating costly bid protests.

**Keywords:** *Source Selection, Bid Protests, Alternative Dispute Resolution, Dispute Systems Design*

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# Conflict Tornado



In 1984, Congress gave its investigatory arm, the General Accounting Office, or GAO (renamed the Government Accountability Office in July 2004), authority to decide protests of source selection decisions under the Competition in Contracting Act. Judicial forums for resolving protests, such as the Court of Federal Claims (COFC) or Circuit Courts, are adversarial by design. GAO is not. It is an alternative dispute resolution (ADR) mechanism, designed to be fast, inexpensive, and flexible.

How well does this process work? The response to this question evokes not one, but two answers. If the question means: Does it handle protests efficiently? the answer is clearly “yes.” If it means: Does it fix the root causes of the conflicts that lead to protests? the answer is less clear. To answer the question, we apply concepts from the theory of dispute-systems design (Costantino & Merchant 1996; Slaiceu & Hasson, 1998; Stitt, 1998; Lynch, 2001; Conbere, 2001; Lipsky, Seeber, & Fincher, 2003; Shariff, 2003; Bordone, 2008).

During Fall 2009 and Winter 2010, we used a protocol designed to diagnose conflict (Ury, Brett, & Goldberg, 1988) to interview over 25 members of the acquisition community:

- Four attorneys at GAO
- Executives and in-house counsel at four prime contractors
- Four outside bid protest counsel
- Contract managers at two small subcontractors
- Current and former officials in the Office of the Secretary of Defense
- Officials and in-house attorneys at three military commands—Air Force Materiel Command, Naval Air Systems Command, and Defense Logistics Agency
- Senate Committee staff
- Executives—typically, former DoD contracting officers with industry trade or professional associations such as the Aerospace Industries Association, the National Contract Management Association, the Professional Services Council, and TechAmerica.

These are not a representative sample, but rather a network that expanded as respondents recommended others who could share their perspectives. Their insights are suggestive, not definitive.

We also analyzed GAO bid protest decisions related to DoD source selections between 2001 and 2009. Our interlocutors generally agree that source selection procedures, although often onerous for everyone involved, are basically fair and bid-protest processes

effective. They also expressed concern about insufficient information, inconsistency, and bias.

## Insufficient Information

In the absence of information, innocuous matters can grow into spirals of conflict. Miscommunication and misperception trigger distrust and sometimes hostility even though the procedures for resolving disagreements seem clear (Carpenter & Kennedy, 2001). For example, an offeror, having made a significant investment in the process, seeks information or acknowledgement of a problem. The contracting agency, also having made a significant investment, resists. Negotiating does not resolve the problem. The offeror perceives the agency to be stonewalling. The agency perceives the offeror to be seeking a competitive advantage.

After protesting informally, an offeror might protest formally within the contracting agency or skip the formal, agency-level review and go directly to GAO. Other parties begin to take sides. Elected officials, for example, step in, perhaps directing affected constituents to pursue the protest at the GAO. The contract winner may step in to support the agency.

GAO procedures are fairly well defined and managed, often resolving the dispute. However, a company dissatisfied with GAO's decision can go to COFC or pursue the matter in Congress or with other decision makers at DoD or elsewhere in the Executive Branch—a relatively unmanaged process. As the conflict escalates, communication becomes fraught; misunderstandings multiply. Zealots replace moderates and invest resources to win rather than to resolve disagreements. Perceptions distort, parties lose objectivity, gray areas become black or white, or seemingly innocuous behaviors become meaningful as distrust and suspicion grow.

To generate more complete and accurate information, government establishes regulations, typically in the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS). In the Federal Acquisition Streamlining Act of 1994, Congress made agency debriefings mandatory upon request. Rejected offerors may request information from the agency about the basis for its selection decision and contract award. A potential benefit of conducting a debriefing is to prevent a bid protest by explaining the reason for agency decisions so the rejected offeror will see that the agency acted within the bounds of its discretion and consistent with its evaluation plan.

If an agency gears its standard of disclosure to surviving the protest at GAO, which can result in the agency sharing less information, the offeror, anticipating this, might start bringing attorneys

to debriefings to elicit more information. The engineers, attorneys, or head of a business unit want to explain to the team that spent time working on a proposal why the company lost. Executives to whom they report want to know, as well. The agency might perceive the presence of attorneys as a threat (Szeliga, 2008). In a classic illustration of a conflict spiral, the dissatisfied offeror files a protest and contracting agency executives have to explain to their team, who also invested time working on the source selection, why the company filed a protest, and, potentially, why GAO sustained it.

Where an agency discloses in a debriefing as much to rejected offerors as it would to the Source Selection Authority, some offerors will be grateful and satisfied. However, some rejected offerors will comb the information to find bases for challenges. A business consultant and contactor said, “Even if you give a contracting officer a script for the debriefing, written by an attorney, a rejected offeror can find a problem in a gesture or a phrase.” A prime contractor executive said, “If the agencies are becoming paranoid because attorneys are involved earlier so agency people become more cautious in what they say, remember the old saying: ‘Just because you’re paranoid doesn’t mean someone isn’t out to get you.’”

Agencies fear rejected offerors will exploit their every word, so utter fewer of them. Businesses fear agencies will utter fewer words, so try to pry more out of them. In a spiral of conflict, perception matters more than substance. Reciprocating reactions create an adversarial tone.

## Inconsistencies

Ironically, postaward debriefings can contribute to a climate of distrust because the FAR gives a contracting officer discretion in the content of debriefings. At one agency, a vendor might receive a 10-minute review, scripted by an agency attorney, with a contracting official showing one Powerpoint slide containing the minimal amount of information required by the FAR and minimal opportunity for the rejected offeror to ask questions. At a second, the vendor might receive an analysis of what the contractor did or did not do that was problematic. At a third, the vendor might receive a 2-day review by multiple members of the source selection team, including engineers and attorneys, presenting essentially the same information conveyed to the Source Selection Authority; the agency will ask the winner for permission to explain to rejected offerors why the agency selected the winner, albeit with competitive information redacted. The rejected offeror has ample opportunity to ask questions. Even within the same agency, people disagree on which debriefing approach to implement.

Not knowing what they will encounter, businesses prepare for the worst. Conversely, while some business executives maintain resolutely that they attend debriefings to find reasons not to protest, agencies cannot necessarily discriminate them from executives who attend to prepare to protest. Reflecting the cost of inconsistency, a protest attorney believes agencies build 3 months into their schedules for large contracts to account for bid protests, and companies build the expected cost of a protest into their overhead.

After companies file protests, disclosure practices also can be inconsistent across agencies. Anticipating a protest, one agency might have documented every step it took from the outset and prepared to reveal all. Another might not create a file, as in a legal discovery process, until the protest has been filed. If the bid protest targets a particular part of the selection process, an agency might focus its disclosure on only the protested part. If a rejected offeror is unable to distinguish an agency that will disclose more postprotest from one that will disclose less, it has an incentive to challenge multiple, interrelated parts and, prior to that, to mine debriefings for information that could provide the basis for protests, increasing the costs to the agency and irritating its decision makers.

A perception of inconsistency afflicts decision making at GAO, as well. GAO attorneys discriminate frivolous from legitimate protests—those that point out an error in a contracting agency's processes. They also differentiate among legitimate claims those that are material—meaning the outcome of the source selection might have been different but for the agency's error—from those that are immaterial. In that sense, GAO, in effect, applies a standard of reasonableness in its bid protest decisions and works to maintain that standard with consistency.

Members of the acquisition community on both the government and the business side believe GAO's standards of reasonableness and materiality have eroded, encouraging more protestors to file protests and more protests to involve frivolous and immaterial claims. GAO disagrees that its standard of reasonableness has declined. An independent legal analysis might confirm that it has not. What nourishes spirals of conflict, however, is the perception that it has.

Similarly, some agencies and legal practitioners expect GAO to follow precedent but perceive that it does not. Others believe GAO exercises discretion in the areas where it chooses to rule and on the direction of its rulings, by ignoring facts in one case that are the same as in another case and should be determinative in both. When a new area of dispute arises, such as organizational conflicts of interest in the early 2000s, GAO will choose to find merit in claims in the new area and begin sustaining them until the

acquisition community adapts to the likelihood of those claims prevailing. A protest attorney might argue less on precedent relevant to the main issue in a protest than on attracting GAO's attention to a minor issue that could set a new one. For good or ill, GAO's pursuit of its multiple missions—third-party intervenor, educator, and promoter of competition—can contribute to a perception of its inconsistency.

## Perceptions of Bias

The acquisition community's perception of bias takes several forms. For example, few of our business interviewees found agency-level reviews to be efficacious (Troff, 2005) because they believe agencies become defensive. A bid-protest attorney asks why an agency would correct its own mistake? "It's more likely to circle the wagons. An agency review is a single filing, no discovery, and you wait for an agency to decide." He recommends against it.

An informal agency review involving one-on-one conversations can make an agency nervous that a company will try to influence the definition of requirements or the evaluation scheme to favor the proposal it intends to submit. One trade association official described this as "a Kabuki dance." After agencies publish solicitations, businesses believe the agencies have vested interests in them and tend to be dismissive of inquiries from companies. Frustrated offerors do not see agencies as neutral venues.

Vendors hear agencies say that protests are part of the source selection process and they do not and legally may not treat a protestor with prejudice during a subsequent selection. But, as a consultant to many offerors put it: "The contracting community lives in fear of retribution for protesting." A vendor protests, then loses a subsequent contract and attributes the failure not to its unresponsive bid, but to the agency seeking retribution. Or, vendors experience retribution for poor performance in the business world and project it into the government world. Offerors believe that protests impact careers in the agency, leaving its decision makers with prejudice.

The business executives' fears are not necessarily misplaced. A former contracting official described the ease with which an agency can exact revenge. Suppose a contracting official wishes to punish a vendor who protested and subsequently plans to bid on a contract to be performed outside its geographical area in competition with vendors close to the location of performance. The contracting official specifies in the solicitation that expenses will not be reimbursed for travel in excess of 50 miles, effectively denying the target offeror an opportunity to bid.

Some members of the acquisition community perceive that Democratic administrations favor particular firms, Republicans others, that defense agencies have their pets, and that the GAO decisions reflect congressional preferences. A few cited specific examples that confirmed their suspicions, but most were based on little more than hearsay. What is remarkable about these responses is the distrust the participants expressed about the source selection process, despite the fact that, when queried about their own experiences, they often described the officials they had direct contact with as open, helpful, and informative.

Several factors bear on this. First, a rejected offeror, not having achieved its objectives, will blame the process. This is human nature, a “self-serving attribution” (Malhotra & Bazerman, 2007, p. 135). As a trade association official put it: “When you’ve lost, you distrust the system and believe the decision was wired for someone else.”

Second, the inherent subjectivity of the decisions made by agencies induces distrust of the process by business participants. Evaluating “best value,” for example, requires balancing price, performance, and other characteristics, which is problematic. A contracting agency official said: “Even big companies believe government looks only at lowest price, not at best value.” Business executives concur (Schofield, 2009, p. 53).

Third, smaller companies, who comprise the majority of offerors and a disproportionate source of protests, are less sophisticated. They might not devote resources to obtaining contracting expertise or in-house or outside counsel. The company errs but believes the government did. A small company might protest because it believes an injustice has been done. Indeed, it might perceive a bias based solely on its size, a view expressed by a business executive at a smaller firm who said, “No one gets fired for hiring Raytheon, but someone can get fired for hiring [my company].” In contrast, a large company with multiple product lines makes a business decision to protest based on assessing the potential outcome versus the cost of pursuing the protest.

Given the high cost of understanding these processes, a visible, sustained protest on a high-value contract, like the KC-Tanker, sends a signal throughout the contracting community, triggering new spirals. According to a bid protest attorney: “Lots of contractors now think that if they work hard, turn in a good bid, and protest vigorously, they might win, as Boeing did. [My firm] has handled twice as many protests during the past two years as in the previous two.” Decision makers assign outsized significance to low-probability events with significant impact, like a sustained protest on a high-value contract.

Fourth, companies create advantages for themselves, sometimes in ways that undermine confidence in the contracting process. For example, a company buys expertise about the contracting process by recruiting contracting officers from government agencies. Competitors believe that these contracting officers will trade not only on their expertise, but also on their relationships with decision makers in the contracting command.

Fifth, contracting commands need expertise from their suppliers to define requirements. Not all suppliers have the access, experience, and resources to respond. The result can be requirements that preclude some suppliers from qualifying. Regulations designed to create fairness can have the opposite effect because of their complexity. According to a business executive: People who know how to play the game will prevail.

Sixth, although GAO maintains that it operates on professional principles, immune from political influence by members of Congress, people in the business world do not believe it. A legal practitioner at a prime contractor said, “No matter what the issue, you can find GAO opinions on either side. GAO tries to keep the politics out of it. I don’t know how they do it when their bosses in Congress are calling them in to testify at hearings.”

Businesses seek congressional assistance in securing a contract or in protesting failure to win. GAO believes members of Congress like being able to direct their constituents to GAO for a neutral hearing, rather than having to do battle over the matter with another member (McCubbins & Schwartz, 1984). Nonetheless, as elected officials are wont to do, they will take credit for GAO decisions that favor their constituents, damaging perceptions of GAO’s neutrality.

## Recommendations

In general, agency officials agree with industry executives and attorneys: What an agency does to conduct a good source selection is also what will avoid a protest. However, given the root causes we found to be associated with spirals of conflict in source selections, we recommend changes that increase the flow of information, improve consistency, and reduce perceptions of bias. The recommendations implement principles of dispute-systems design (Ury et al., 1988).

### Principle No. 1: Put the Focus on Interests

To short circuit a spiral of conflict, focus the parties on solving a mutual problem, face-to-face, in a relatively informal process that they help to shape (Carpenter & Kennedy, 2001, pp. 26–29). The parties at the lowest level will have the best information, be able to

respond most quickly, and be more likely to satisfy their underlying interests—the reasons why each party is participating in the source selection process—so they are less likely to perceive bias. That would be agency-level review.

At the Defense Logistics Agency (DLA), contracting officers respond when there are source selection problems. Sometimes, they educate offerors. Other times, if an offeror is correct, the contracting officer rectifies the situation. If an offeror formally protests to DLA, it can choose to go to either the contracting officer or to the



chief of the contracting officer, but not both. DLA's internal alternative dispute resolution (ADR) process employs trained mediators. No appeal within DLA is possible; the next step is GAO. Since 2004, DLA has had a lower rate of protests at GAO than the Army, Navy, Air Force, or DoD (Maser, Subbotin, & Thompson, 2010).

Procurement agencies have not been aggressive in implementing an executive order requiring agencies to create ADR systems (Nabatchi, 2007). First, it was a relatively new concept, so agencies were not convinced that it served their organizational interests. Second, few internal pressures existed to use it, and external actors were

not clamoring for it. Third, agencies had little empirical evidence of its merits. However, the concept is no longer new. The likelihood of increasing numbers of protests that forestall execution makes agency-level reviews more efficacious. The success of DLA's and GAO's processes testifies to the merits of ADR on principle. From an incentive perspective, requiring agency-level reviews would give agencies added incentives to document their decisions, and thereby improve disclosure, especially if their responses become part of the record before GAO. Whether it will work with source selections more complex than those at agencies like DLA merits testing.

### **Principle No. 2: Provide Loop-Backs to Interest-Based Negotiation**

The bid protest system encourages parties to do this by allowing agencies to take corrective actions. At any time, including during GAO's proceedings, an agency can respond affirmatively to the claims made by an offeror, who then withdraws the protest. GAO has a specialized form of ADR nested within it—predictive-dispute resolution—where GAO predicts the outcome of its decision making based on a preliminary analysis.

This has resolved a high percentage of protests by parties who have participated in it.

Incentives for offerors to negotiate seriously could be implemented. If a rejected offeror lodges multiple protests with one or more agencies, who all conclude that the protests have no merit, and if GAO subsequently agrees, then after some number of protests, such as three in 3 years, GAO could be empowered to require the rejected offeror to begin compensating the agencies for their costs associated with responding to the protests. Failing Congress authorizing GAO to do that, GAO could begin documenting repeatedly frivolous protest behavior as part of past performance data that agencies consider in making awards. This merely makes transparent and systematic something contractors already believe transpires in obscurity and inconsistently.

### **Principle No. 3: Provide Law-Cost Rights and Power Backups**

If interests-based negotiations do not yield a resolution acceptable to both parties, they require access to a determinative process. This, in effect, is what GAO's bid protest process represents relative to the COFC. The process looks more like nonbinding arbitration than mediation, although it does not fit neatly into any traditional model of ADR. Arbitration, chosen primarily for its finality and efficiency, is more about consistency—within limits. Something akin to a precedent can emerge, but not as rigorous a body of precedent

and law governing discovery and evidence as an Article 3 court (Metzger & Lyons, 2007).

GAO should monitor and be transparent about its standards of materiality and reasonableness and the processes by which they are assured. A higher standard might be appropriate for incumbents who protest, either in terms of agencies providing a rationale for changing suppliers or in terms of GAO's standard of the reasonableness of an incumbent's claim. If an agency has had experience with an incumbent and still believes a new contractor is preferable, GAO could afford greater deference to the agency. This offsets, in part, the incumbent's informational advantage in the competition and its incentives to protest to extend its contract for the period of the protest review.

#### **Principle No. 4: Build in Consultation Before, Feedback After**

As a form of consultation between agencies and rejected offerors, debriefings remain key to improving trust and mitigating protests. To promote disclosure means, ironically, that agencies should assume rejected offerors will protest. Agencies should supply them the same information provided to the Source Selection Authority, which is to say, the same level of detail that the agency should provide in responding to a protest. Agencies should be able to explain to the offeror why that offeror was not selected; if the agency cannot do that in a debriefing, then it will not be able to defend itself in a protest.

A Source Selection Joint Action Team in the Office of the Secretary of Defense is looking at the consistency of debriefings. This office or its designated agents should collect data continuously about the quality of the debriefings to compare performance with expectations and, thereby, to continue to improve them. A related recommendation is to mitigate the adversarial tone in debriefings. Rather than explaining how the rejected offeror erred and should change so as to help the agency, the debriefing ought to explain what the offeror should do better to help itself (Thompson, 2009, p. 165).

Another way to improve consistency is to record debriefings. This might obviate the need for attorneys to attend them. It also obviates the need for protestors to solicit affidavits from everyone at their companies who attends a debriefing. It also supports GAO's job as third-party intervener. A contracting official can say the same thing in debriefings to two different protestors; depending on the attitudes and interests of the protestors, one will find the contracting official unresponsive and the other will not. If a protest results, GAO can judge.

Finally, GAO reports to Congress annually on the number of bid protests and their resolution, including agency responses to GAO decisions and the number of corrective actions. To improve the efficacy of its bid protest system, GAO should track and report more fully to Congress on the outcomes of agency decisions. If, for example, an agency agrees to take corrective action—which is generally viewed as a positive outcome—by initiating a new solicitation but takes years to do so, devaluing the investment made by the contract winner and putting other offerors on hold, the result is not necessarily salutary. Congress should have better feedback on what works and what does not.

### **Principle No. 5: Provide Necessary Motivation, Skills, and Resources**

To make agency-level reviews more credible, agencies should use staff trained in negotiation and mediation, preferably using parties different from those engaged in the initial decisions (Troff, 2005, pp. 145-149). The same idea applies to peer reviews of source selections, formally instituted in 2008. Peer reviewers should be trained to conduct a peer review, which is different than conducting a source selection; and their involvement should become part of their performance evaluation and tracked, which does not happen systematically. Finally, if certification becomes the coin of the realm in the government's Defense Acquisition Workforce (Fast, 2009), contractors could be required to have staff whose understanding of the source selection process is certified, as well.

Another skill to improve consistency in source selections would be for agencies to invest in managing risk in the way companies do. DoD has developed a methodology for risk management that lodges primary responsibility with the program manager, and explained it in *Risk Management Guide for DoD Acquisition* (DoD, 2006). It focuses on three risks: performance, cost, and schedule. The term “source selection” never appears. The term “contracting officer” appears twice. While it purports to apply to the entire acquisition process, it focuses on contracting and contract execution after source selection.

Yet source selection is all about managing risks. Technical risk concerns the ability of the product to perform to specifications. Financial risk concerns the ability to deliver the product or service on budget. Sustainment risk concerns the ability to maintain the product within budget. Congressional risk concerns political support for or interest in the product or service. Appropriation risk concerns the ability of Congress to continue funding the product or service. Reputational risk concerns the ability of the agency to execute a successful source selection. Bid protest risk concerns

the likelihood of drawing a protest. Some risks are internal to the agency; others are external (Rogerson, 1994). Some are tangible; others less so.

Companies face an analogous set of risks to their success in bidding, although they perceive risk differently (Frick, 2010). Many have a chief risk officer (CRO); agencies do not. Some believe the Source Selection Advisory Committee identifies risks for the Source Selection Authority, who plays the CRO. Other current and former contracting officials see no one responsible for identifying the complete range and extent of risks in source selections and apprising decision makers of their options and tradeoffs in managing them. While methods for adapting corporate risk management processes to acquisitions have been developed (Rice, 2010), systematically assigning responsibility and authority for using them has not. Adopting common methods and structural arrangements to manage risk could reduce perceptions of bias and inconsistency.

## Conclusions

Given the inevitability of human error, good source selection processes will not eliminate protests. As an agency official put it: “The question is one of reasonableness. If one puts in place processes to ‘perfect’ the source selection so as to minimize protests, you’ll create delays in producing the award that may exceed the delays caused by the protest process.” Once an offeror decides to protest, in the words of a bid protest attorney: “Alternative dispute resolution works.” It provides a valuable, inexpensive way of resolving disputes, especially compared to the judicial process. Another said, “It limits the time you are spending a client’s money. GAO helps the sanity of the acquisitions community.”

Principles of ADR and dispute systems design can prevent conflict spirals and mitigate those that begin. Strengthening agency-level review can reconcile the interests of disputants at low cost. Peer reviews and greater disclosure through thorough debriefings can increase the parties’ satisfaction with the process and its outcomes. Treating risk management in source selection as systematically as it is treated in contract execution can improve consistency in decision making and, thereby, relationships among the parties, including not only agencies and contractors, but also Congress and other stakeholders. Greater transparency in GAO’s standards can promote GAO’s multiple missions, which in turn can produce more durable resolutions.

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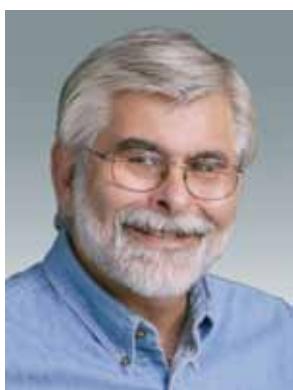
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